Supreme Court, U.S.
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No. 95-1017

In The Supreme Court of the United States

October Term, 1995

GENERAL SIGNAL CORPORATION,
Petitioner,

vs. -

MCI TELECOMMUNICATIONS CORPORATION,
Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the Court should grant certiorari to review comments, in dicta, by a court of appeals regarding the role of Fed. R. Evid. 403 when the allotted trial time of a party has expired, where:

(a) the court of appeals held that the actions of the district court did not prejudice petitioner, and thus expressly declined to resolve the Rule 403 issue; and

(b) the dicta is not in conflict with decisions of any federal court of appeals.

RULE 29.6 LIST

Respondent, MCI Telecommunications Corporation, is a wholly-owned subsidiary of MCI Communications Corporation. Respondent lists the following nonwholly owned subsidiaries pursuant to Rule 29.6: General Communication, Inc.; IFP Holdings, Inc.; and ICS Communications, Inc.

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The Petition for Writ of Certiorari should be denied for two fundamental reasons:

First, it seeks review of an issue which did not form the basis of the Ninth Circuit's judgment. The Ninth Circuit did not decide petitioner's claim that it was entitled to an on-the-record Rule 403 analysis of the additional evidence it wished to present after it had exhausted its allotted trial time. Rather, the court expressly declined to reach the merits of that issue, holding: "[W]e need not decide whether the district court's denial of [General Signal's] motion for additional time constituted error, because the exclusion on account of the time limit did not prejudice [General Signal]." *General Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1510 (9th Cir. 1995) (A 18-19).[1] Thus, petitioner improperly seeks review of language which is Ninth Circuit dicta.

Second, this case does not present an issue of law on which there is a split of authority between any courts of appeal. The Ninth Circuit's time limit discussion, in dicta, is in harmony with the three decisions cited by General Signal from other circuits.

COUNTERSTATEMENT OF THE CASE

The record below demonstrates, and both the Ninth Circuit and the district court found, that petitioner's inability to present evidence at trial was "the consequence of [General

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[1] "A" refers to the Appendix to the Petition for Writ of Certiorari. "Pet." refers to the Petition itself. "ER" and "SR" refer, respectively, to the Excerpts of Record filed in the Ninth Circuit on July 7, 1994; and the Supplemental Excerpts of Record filed on August 30, 1994.

Signal's] mismanagement of its case-in-chief, for which neither MCI nor the court was responsible." *Id.* at 1509 (A 17); *see also id.* at 1508-09 (A 15); ER 200-01. In a trial where the parties had ample and specific notice of trial time allocations, 66 F.3d at 1508 (A 15), petitioner consciously chose to disregard those limits, as well as repeated warnings by the district court, and thus deprived itself of time to present additional evidence. *Id.* at 1509 (A 16).[2] Having expressly found that General Signal agreed to the time allocations, *id.* at 1508 (A 13), the Ninth Circuit observed:

> "[General Signal], not the [district] court, was primarily responsible for its inability to present its case within the time limits. [General Signal] used the vast majority of its time during its case in chief, introducing duplicative evidence and taking a leisurely approach to its presentation."

Id. at 1508-09 (A 15).

Nevertheless, the district court indulged General Signal and permitted it even more time than it was due for cross-examination and the presentation of evidence.[3]

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[2] Petitioner's assertions about (a) the number of trial hours allotted (Pet. at 3), (b) its knowledge of how the allocations would be administered (Pet. at 3), and (c) the flexibility of the district court in managing trial time (Pet. at 3-5) are factually incorrect and contrary to the explicit findings of the Ninth Circuit and the district court. 66 F.3d at 1508-09 (A 13, 15, 17); ER 200-01.

[3] *General Signal*, 66 F.3d at 1508 (A 15); ER 200; SR 622:18-623:10; SR 695:8-705:25; SR 721:7-732:14; SR 734:17-741:13; SR 742:9-752:11; SR 755:20-761:16.

Petitioner's claim that it deserves a new trial because the district court did not conduct an explicit, on-the-record analysis under Fed. R. Evid. 403 was not decided by the Ninth Circuit because the court of appeals found that petitioner suffered no prejudice and that any error by the district court was harmless. *General Signal*, 66 F.3d at 1510-11 (A 18-20); ER 201. The Ninth Circuit found, as a matter of fact, that any allegedly foregone cross-examination and rebuttal evidence would have been duplicative of equivalent evidence presented by General Signal during the trial or was inadmissible on substantive evidentiary grounds. 66 F.3d at 1510-11 (A 19-20).[4] The court of appeals thus declined to rule on the issue whether an explicit Rule 403 analysis was required, noting only in dicta that such a practice was "advisable." *Id.* at 1510 (A 18-19).

REASONS FOR DENYING THE WRIT

I. The Petition for Certiorari Seeks Review of Dicta.

General Signal is asking the Court to grant a writ of certiorari to review one paragraph of dicta by the Ninth Circuit regarding the application of Rule 403 of the Federal Rules of Evidence. *Id.* at 1509-10 (A 18). The Court does not grant certiorari to review dicta. *E.g.*, *California v. Rooney*, 483 U.S. 307 (1987); *Black v. Cutter Labs*, 351 U.S. 292 (1956).

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[4] For the reasons stated by the Ninth Circuit, *id.* at 1508 (A 13-15), these facts dispense with General Signal's due process arguments. As found by the Ninth Circuit, General Signal's time problems were of its own making and, in any event, did not ultimately prejudice General Signal. *Id.* at 1508-11 (A 13-20).

On appeal to the Ninth Circuit, General Signal argued that the time allocations were applied unreasonably and inflexibly. *General Signal*, 66 F.3d at 1508 (A 13-14). General Signal further argued that the district court committed a *per se* abuse of discretion by not conducting an on-the-record Rule 403 analysis for each piece of evidence it proffered after it had exhausted its allotted time. *Id.* at 1509 (A 17). The Ninth Circuit readily found that, on the facts presented, the time allocations were reasonable, *id.* at 1508 (A 13, 15), and that "the district court's management of its time limits was sufficiently flexible." *Id.* at 1509 (A 17).

On the question of the Rule 403 analysis, the Ninth Circuit made clear that it was not reaching the merits because, based on its findings and those of the district court, any error at trial had been harmless. *Id.* at 1510-11 (A 18-20); ER 201. The Ninth Circuit, in fact, never stated how it would have resolved the merits of the Rule 403 question.

While General Signal mischaracterizes the court's passing observations as its holding (*see* Pet. at 6, 12, 14), the Ninth Circuit left no room for such mischaracterization:

> "Although it clearly would have been advisable for the district court to weigh explicitly the probative value of [General Signal's] evidence in deciding whether to grant additional time, *we need not decide whether the district court's denial of [General Signal's] motion for additional time constituted error, because the exclusion on account of the time limit did not prejudice [General Signal].*"

General Signal, 66 F.3d at 1510 (A 18-19) (emphasis added).

The trial and appellate courts found, as a matter of fact, that the evidence General Signal wanted to present in a rebuttal case was inadmissible on substantive grounds. *See supra*, p. 3. The Ninth Circuit further found no prejudice to General Signal from exclusion of the proffered cross-examination testimony. *See supra* p. 3.[5]

Harmless error is not a basis for a new trial. Fed. R. Civ. P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"); *McKnight v. General Motors Corp.*, 908 F.2d 104, 115 (7th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991). Nor does harmless error provide a ground for this Court's review. Sup. Ct. R. 10.

In this case, in order to reach the merits of the Rule 403 issue General Signal raises, the Court would have to overturn case-specific factual determinations made by the lower courts that General Signal suffered no prejudice. Absent such a ruling, any decision by the Court on the merits would be hypothetical and would not affect the judgment below.

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[5] General Signal is factually incorrect when it argues that the Ninth Circuit did not have offers of proof from which to assess prejudice to General Signal. Pet. at 7, 10. General Signal devoted nine pages of its 34-page appellate brief (and several pages of its reply brief) to explaining to the court of appeals, in considerable detail, precisely what evidence it hoped to present with additional cross-examination and in rebuttal.

II. The Ninth Circuit's Observations Regarding The District Court's Administration Of Its Time Allocations Do Not Conflict With Other Appellate Decisions.

The Ninth Circuit, in dicta, indicated that "it clearly would have been advisable" for the district court to have engaged in an explicit Rule 403 analysis. *General Signal*, 66 F.3d at 1510 (A 18). Contrary to General Signal's contentions, the Ninth Circuit's observation regarding Rule 403 is not in conflict with the three decisions of the other courts of appeal set forth in the Petition.

Indeed, as the Ninth Circuit recognized, "issues relating to the management of trial [are reviewed] for an abuse of discretion," *id.* at 1507 (A 11), which requires an evaluation of case-specific facts in context of the overall trial. Not surprisingly, none of the decisions cited by General Signal addresses (much less decides) the question whether a district court must, in all cases, conduct an on-the-record Rule 403 analysis of each piece of evidence proffered by a party prior to enforcing reasonable court-established limits on trial time. Only one of the cited cases involved limits on trial time at all and, in that case, the court's discussion of the issue is both dicta and in harmony with the Ninth Circuit's comment.

A. The Eighth Circuit's Decision In *Hollingsworth* Does Not Address Court-Established Time Limits And Is Not In Conflict With The Ninth Circuit's Dicta.

In *First Nat'l Bank & Trust Co. v. Hollingsworth*, 931 F.2d 1295 (8th Cir. 1991), the district court precluded defendant Hollingsworth, a critical witness and a party, from testifying live before the jury in his own defense. No similar exclusion of an important witness occurred in this case. Court-established limits on trial were not an issue in *Hollingsworth*; nor were time limits even discussed by the Eighth Circuit in reversing the district court.

Given that plaintiff had "devoted a significant portion of its case-in-chief to reading A.L. Hollingsworth's pre-trial deposition into the record," *id.* at 1301-02, and that defendant Hollingsworth was such a material witness, the Eighth Circuit could not sustain the district court's ruling:

> "Whether or not Hollingsworth's testimony is cumulative to that given in the deposition is immaterial. As a party and a material witness, he should be given every opportunity to allow the jury to observe his demeanor and pass upon his credibility."

Id. at 1305.

The Eight Circuit in *Hollingsworth* did not conclude -- or even discuss -- whether a district court's failure to conduct a Rule 403 analysis prior to enforcing court-

established time allocations constitutes a *per se* abuse of discretion.

B. The First Circuit's Decision In *DeSisto* Similarly Is Not In Conflict With The Ninth Circuit's Dicta.

The decision in *Secretary of Labor v. DeSisto*, 929 F.2d 789 (1st Cir. 1991), similarly did not involve court-established limits on trial time. This fact alone underscores the absence of a conflict deserving this Court's attention.

In *DeSisto*, the Secretary of Labor commenced a Fair Labor Standards Act ("FLSA") case against the operator of two boarding schools. Together the schools had "244 employees holding a variety of positions at different locations." *Id.* at 793. Although not all employees needed to testify, the First Circuit ruled that, pursuant to the FLSA:

> "Where the employees fall into several job categories, it seems to us that, at a minimum, the testimony of a representative employee from, or a person with first-hand knowledge of, each of the categories is essential to support a back pay award."

Id. at 793.

The *DeSisto* trial court, however, arbitrarily limited each side to one witness, thus dispositively prejudicing the merits of plaintiff's case. *Id.* at 791. As a matter of law, the district court prevented plaintiff from satisfying its threshold burden of proof. *Id.* at 793. Given the evidentiary requirements of FLSA, the trial court's pre-trial

exclusion of additional witnesses was facially unreasonable. The issue of pre-trial exclusion of witnesses does not exist in this case.

C. The Seventh Circuit's Dicta In *McKnight* Is Not In Conflict With The Ninth Circuit's Dicta in *General Signal*.

General Signal cannot portray *McKnight v. General Motors Corp.*, 908 F.2d 104, as conflicting with the Ninth Circuit's dicta in *General Signal*. The *McKnight* court's brief discussion of the time limits issue is itself entirely dicta. *Id.* at 114-15. The court of appeals held that defendant General Motors did not preserve the time limits issue. *Id.* at 115. This Court does not find a reviewable conflict in the passing dicta of appellate courts. *Rooney*, 483 U.S. 307 (1987); *Cutter Labs*, 351 U.S. 292 (1956).

In any event, the Seventh Circuit's time limit discussion in *McKnight* is consistent with the Ninth Circuit's comments in *General Signal*. The *McKnight* court, in dicta, disapproved of a district court's "impos[ing] arbitrary limitations, enforc[ing] them inflexibly, and by these means turn[ing] a federal trial into a relay race." 908 F.2d at 115. The Ninth Circuit, likewise, cautioned that district courts "must not adhere so rigidly to time limits as to sacrifice justice in the name of efficiency." *General Signal*, 66 F.3d at 1509 (A 17). The court of appeals in *McKnight* did not even mention Rule 403, much less incorporate it into its discussion of the time limits.

At bottom, what General Signal is complaining about is the Ninth Circuit's factual findings, not the legal standard that was applied. Contrary to the *McKnight* court, the *General Signal* panel found that the district court's time allocations were reasonable, *id.* at 1508 (A 13, 15), and that its "management of its time limits was sufficiently flexible." *Id.* at 1509 (A 17). The Ninth Circuit expressly considered the *McKnight* case and properly distinguished it based on General Signal's irresponsible conduct at trial:

> "Whereas the defendant's lack of time in that case [*McKnight*] was attributed primarily to the plaintiff's excessive case-in-chief, ... the lack of time available at the end of this trial was largely the consequence of [General Signal's] mismanagement of its case-in-chief, for which neither MCI nor the court was responsible."

Id. at 1509 (A 16-17).

Far from being a "relay race," as in *McKnight*, as found by the Ninth Circuit, the trial below was characterized by General Signal's "introducing duplicative evidence and taking a leisurely approach to its presentation." *Id.* at 1508-09 (A 15).

CONCLUSION

There is no legal remedy for a party's own mismanagement of trial time. The Petition for Writ of Certiorari, therefore, should be denied.

Respectfully Submitted,

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